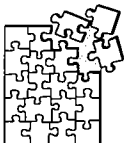




George Pataki, Governor
Randy A. Daniels, Secretary of State

Records, Findings & Decision Making

The Record - Facts the Board Assembles



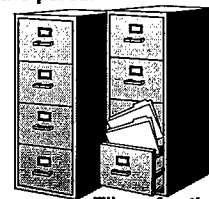
- Newspaper notices
- Transcripts and minutes of meetings
- The application and supporting documentation, such as the EIS
- Testimony at public hearings
- Written submissions during the public comment period
- Expert opinion submitted orally or in written form
- Personal observations and knowledge of board members that are entered into the record

Paperwork must be located where you can find it, and where someone else can find it if you are not there.



**Municipal Clerk is
the central
repository of all
records**

**History of
the parcel**



**Files of active
applications**

Tracking Projects



- Assign each project a number
 - Each authority should have a separate sequence, such as Z98-1, Z98-2, P98-1, P98-2
- Cross reference the project number with the tax parcel identification number
 - No need to keep separate planning board, ZBA, or building records
- File records by location of the property
 - Store by tax parcel i.d. number

Why use county tax parcel i.d. numbers?

- Over time, street names change, houses are renumbered, new parcels are created
- The tax parcel i.d. system is infinitely expandable
- The history of the parcel can be traced
- The town assessor can look into improvements on a property being reassessed
- Allows the information to be cross-referenced in a Geographic Information System (GIS)

Plan for Possible Court Challenges



- Develop checklists to track actions taken with the dates noted
- Keep the files complete - copy all relevant information to the file

Keeping Track of What Happened at the Meeting or Hearing

The only information **required** to be in the record of a **Meeting** is a list of motions made and votes taken on the motions.

A more detailed record should be made of a **Hearing**



- Stenographic is best
- If taping, take notes to go with tape
- Written record does not have to be verbatim

Tips for Board Members

- Ex parte communication should not be concealed or disregarded (example: a phone call or letter from the applicant)



- Make sure the board follows its own procedures



- Don't make statements that you would not be happy to see in print or that could be interpreted wrongly when intonation or nonverbal cues are missing.
- Don't make a conclusory statement ("I'm in favor of the project") before all the facts are heard.

Drafting the Findings

Findings describe the reasons for the denial or approval of an application, and may also support why a condition was imposed.

Findings are an analysis which applies law to facts, leading to conclusions. Findings should be able to support a decision if it is challenged in court.

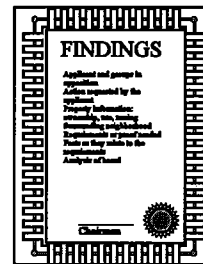


Legal Standards for Decision

- List all applicable standards contained in state statutes and local laws/ordinances
- Under each standard, list the matters of evidence that go to support or refute satisfaction of the standard
- Weigh the evidence listed under each standard.
- Determine whether compliance with each standard is established by the facts, or would be established if conditions were added to the approval

Possible Content of Findings

- Legal standards
- Facts as they relate to the legal standards
- Applicant and interested groups
- Action requested by the applicant
- Property information: ownership, use, zoning
- Surrounding neighborhood
- Analysis of board



Conclusory statements are not "findings"

A decision based upon conclusory statements, which is not supported by factual information contained in the record, will be struck down.



General Community Opposition is not a basis for denial

Making a Decision

A decision is a motion for final board action which passes by a majority vote.

- Clearly word motions
- Record each member's vote

ZBA - Appellate Duties

When a quorum of the ZBA is present and participates in a vote on an appeal, a vote of less than a majority of the Board is deemed a denial of the appeal. The ZEO's decision is not overturned.

Voting

Can you vote on an application if you miss the applicant's presentation of the project, the public hearing, or other board meetings at which the application is discussed?

Yes, if you familiarize yourself with the record.

(Look at the minutes, review the application, review comments from the public hearing.)



Making a Decision When County Referral was Required

If referral to the county was required under General Municipal Law §239-m or n, the referring body can't make a decision until the earlier of the following occurs:

- The referring body receives the report of the county planning agency, OR
- Thirty days have passed after the county's receipt of a full statement



Don't vote early and make the decision conditioned on county approval

What can be Filed?

What can constitute a decision?

- The minutes which contain a record of the vote
- A document that records the motion passed
- Other?



At the local level, determine officially what action constitutes "Filing with the Municipal Clerk"

Filing the Decision - Not Just a Loose End



Filing: When the records are placed under the control of the municipal clerk



File decisions within 5 business days after the decision is rendered (or sooner)

The municipal clerk should stamp all records with the date they are received (Establishes the start of the 30 day appeals period)

Tying Up Loose Ends



Have Legal Counsel or other Professional Staff periodically review board decisions



- Send copy of decision to applicant
- If the application was referred to the county, send the county a copy of the decision
- Attach findings to the decision document



REF 3

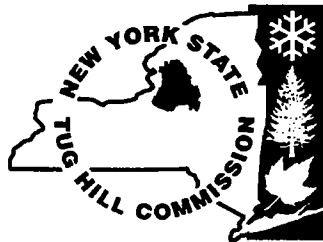
Record Keeping Tips For Zoning Administration

JAMES A. COON LOCAL GOVERNMENT TECHNICAL SERIES



**NEW YORK STATE
George E. Pataki
Governor**

**DEPARTMENT OF STATE
Randy A. Daniels
Secretary of State**



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“Local Government Topics” is a series of papers giving technical guidance on steps to be followed for a variety of problems, issues, and concerns that small local governments in New York State typically face. Other papers in the series are available from the Tug Hill Commission at the above address and phone number.

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INTRODUCTION

Zoning review can be a very bureaucratic process. It involves handling a lot of paper – site plans, special permits, subdivisions, appeals, building permits, certificates of compliance, and enforcement actions. Properly managing this paperwork and keeping organized is often difficult, even in the best of circumstances. But, it is essential to effective zoning administration and enforcement.

Paperwork must be located where you can find it – and even more importantly, where the public can find it. Organized paperwork will help to avoid the unnecessary delays and confusion that results when records cannot be located during the review process, or in the subsequent years following the review.

The job can be made easier by :

- using the municipal clerk as a central repository for all records – as required by law, and
- by having local officials use checklists of actions taken, and filing checklists in such a way that they can be retrieved at a later date.

WHAT ARE THE STATUTORY FILING REQUIREMENTS?

The New York State statutes have specific filing requirements which must be followed precisely. These requirements have been standardized by recent amendments to the planning and zoning enabling legislation for towns and villages.

Site review – the decision of the board shall be immediately filed in the office of the town (village) clerk within five business days after the decision is rendered (Town Law §274-a (8), Village Law §7-725-a (8)).

Special permit – the decision of the board shall be filed in the office of the town (village) clerk within five business days after the date such decision is rendered (Town Law §274-b (6), Village Law §7-725-b (6)).

Subdivision – within five business days from the date of the adoption of the resolution approving the final plat, the chairman or other duly authorized member of the planning board shall cause a copy of such resolution to be filed in the office of the town (village) clerk (Town Law §276 (9), Village Law §7-728 (9)).

Appeals – the decision of the board of appeals on the appeal shall be filed in the office of the town (village) clerk within five business days after the day such decision is rendered (Town Law §267-a (9), Village Law §7-712-a (9)).

WHAT CONSTITUTES FILING?

Records must be placed under the control of the municipal clerk. If you are unsure whether your records are under the control of the clerk, check with your municipal attorney.

WHY IS FILING SO IMPORTANT?

The statute of limitations for challenges to zoning actions generally runs 30 days from time of filing. This means that if records are not properly filed, the municipality may remain vulnerable to an Article 78 proceeding (challenge to an administrative act) until such time as the records are properly filed. Under Article 78, if a judge finds that the municipality violated the procedural requirements (including failure to keep required records), he may **require** the municipality to reverse its action.

HOW SHOULD RECORDS BE FILED?

All records should be stamped with the date they are received by the municipal clerk. This will establish the date which starts the 30 day statute of limitations for challenges to the action. **File records by the location of the property by tax parcel number**, not the chronological date of their receipt.

WHY FILE BY LOCATION?

Many times, it is extremely difficult for a person to remember the exact date that a zoning event occurs. Often the exact date is not relevant to the concern in question. But a person almost always knows, or can easily look up, the parcel location. Consider common reasons for people to search zoning records:

- a potential home buyer, or their attorney, researching the history of building permits and variances on a property to be purchased
- a planning board looking into past variances on a site plan before the board
- a zoning enforcement officer verifying violations of previously approved plans
- a town assessor looking into improvements on a property being reassessed

In all these cases, the location of the property is known. The possible dates of actions taken on these properties is in all likelihood unknown, and impossible to determine without expending enormous time and effort searching chronologically through planning board, zoning board and building/zoning permit records. Where records may date back several decades, it is usually not practical to even consider.

WHAT IS THE BEST MEANS OF IDENTIFYING PROPERTY LOCATIONS?

A simple method is to use the tax parcel identification system. This is a ready made filing system that is infinitely expandable. Each new subdivision of land creates new subcategories of numbers. It is a simple system and is readily available for use by public officials. By keeping all records tagged with the tax parcel identification number, it is easy to route every record to its correct file location.

IS MORE THAN ONE FILING SYSTEM NECESSARY?

No. Although some communities may wish to segregate planning board, zoning board and building/zoning permit records, there is no need to. An integrated record system should be considered for both simplicity and comprehensiveness. Simplicity is the key to most systems working effectively.

HOW CAN RECORDS BE SEARCHED CHRONOLOGICALLY?

Review authorities should use procedural checklists as a routine for all project reviews (see examples in appendix). These checklists help to (1) keep the review authority aware of the necessary steps in the review process, and (2) to provide a permanent record of the sequence and timing of actions taken should the procedure be challenged at a later date. These checklists should be tagged with both the **tax parcel identification number**, as well as a chronological **project log number** for each project. Each authority (enforcement officer, board, etc.) carrying out a review should have a separate project log number sequence (ex. 96-1, 96-2, 96-3, etc.). This checklist should be retained by the review authority, possibly in the form of a notebook. It will provide a permanent cross-referenced record of the location of the associated records in the municipal clerk files.

SUMMARY

It is important to follow the statutory filing requirements of state law, and file all records with the municipal clerk. File records by location using the tax parcel identification number, so that they may be more easily retrieved in the years following. Always use checklists to keep track of project reviews, and to provide a permanent record of where files are located in the municipal clerk's office.

Tax Parcel Number: Section: _____ Block: _____ Lot: _____
Log No.: _____

TOWN OF _____
MINOR SUBDIVISION REVIEW PROCEDURE

Proposed Development Name

Applicant Name and Address

Phone () _____

Date of Action

Sketch plan presented.

Type of SEQR action determined to be:

☐ type I

☐ unlisted

☐ other

EAF form filed.

Environmental significance determined by:

☐ positive declaration

☐ negative declaration

☐ conditional negative declaration

(Note: positive declaration will initiate steps not on this checklist)

Fee paid.

Plat accepted as complete.

Application submitted to county planning agency. *

County planning agency response received.*

Motion to hold public hearing.

Notice of hearing published in paper.

Public hearing held--motion to close hearing.

Action taken on the application:

☐ conditional approval

☐ conditional approval with modifications

☐ disapproval

☐ final approval

Resolution addressing county planning agency review.*

Conditionally approved plat mailed to subdivider.

Conditionally approved plat signed when complete.

Records filed with town clerk.

Plat filed in the office of the county clerk.

Report filed with county planning agency.*

**Counties with GML §239-n reviews only*

Tax Parcel Number: Section: _____ Block: _____ Lot: _____ Log No.: _____

TOWN OF _____
MAJOR SUBDIVISION REVIEW PROCEDURE

Proposed Development Name

Applicant Name and Address

Phone () _____

Date of Action

Sketch plan presented.

Type of SEQR action determined to be:

☐ type I

☐ unlisted

☐ other

EAF form filed.

Environmental significance determined by:

☐ positive declaration

☐ negative declaration

☐ conditional negative declaration

(Note: positive declaration will initiate steps not on this checklist)

Preliminary plat fee paid.

Preliminary plat accepted as complete.

Application submitted to county planning agency.*

County planning agency response received. *

Motion to hold public hearing.

Notice of hearing published in paper.

Public hearing held--motion to close hearing.

Preliminary action taken on the application:

☐ approval

☐ approval with modifications

☐ disapproval

Final plat fee paid

Final plat accepted as complete.

Motion to waive or hold public hearing.

Notice of hearing published in paper.

Public hearing held--motion to close hearing.

Final action taken on the application:

☐ conditional approval

☐ conditional approval with modifications

☐ disapproval

☐ final approval

Resolution addressing county planning agency review.*

Conditionally approved plat mailed to subdivider.

Conditionally approved plat signed when complete.

Records filed with town clerk.

Plat filed in the office of the county clerk

Report filed with county planning agency.

**Counties with GML §239-n reviews only*

Tax Parcel Number: Section: _____ Block: _____ Lot: _____ Log No.: _____

TOWN OF _____
SITE PLAN REVIEW/SPECIAL USE REVIEW PROCEDURE

Proposed Development Name

Applicant Name and Address

Phone () _____

Date of Action

Type of SEQR action determined to be:

☐ type I

☐ unlisted

☐ other

EAF form filed.

Environmental significance determined by:

☐ positive declaration

☐ negative declaration

☐ conditional negative declaration

(Note: positive declaration will initiate steps not on this checklist)

Fee paid.

Application accepted as complete.

Application submitted to county planning agency.

County planning agency response received.

Motion to hold or waive public hearing.

(Waiver may be used only for site plan review procedure)

Notice of hearing published in paper.

Notice of hearing mailed to applicant.

Public hearing held--motion to close hearing.

Action taken on application:

☐ approval

☐ approval with modifications

☐ disapproval

Resolution addressing county planning agency review.

Report filed with county planning agency.

Application endorsed by planning board.

Records filed with town clerk.

Decision mailed to applicant.

Zoning permit issued.

Certificate of occupancy issued.

Tax Parcel Number: Section: _____ Block: _____ Lot: _____ Log No.: _____

TOWN OF _____
APPEALS PROCEDURE

Proposed Development Name

Applicant Name and Address

Phone () _____

Date of Action

Application for appeal received.

Type of SEQOR action determined to be:

☐ type I

☐ unlisted

☐ other

EAF form filed.

Environmental significance determined by:

☐ positive declaration

☐ negative declaration

☐ conditional negative declaration

(Note: positive declaration will initiate steps not on this checklist)

Fee paid.

Motion to hold public hearing.

Notice of hearing published in paper.

Notice to parties and regional state park commission.

Application submitted to county planning agency. (*variance only*)

County planning agency response received.

Public hearing held--motion to close hearing.

Action taken on application:

☐ approval

☐ conditional approval

☐ disapproval

Entry of decision into minutes.

Resolution addressing county planning agency review. (*variance only*)

Report filed with county planning agency. (*variance only*)

Records filed with town clerk.

Decision mailed to applicant.

Notification of zoning officer.

Tax Parcel Number: Section: _____ Block: _____ Lot: _____ Log No.: _____

TOWN OF _____
ZONING PERMIT PROCEDURE

Proposed Development Name

Applicant Name and Address

Phone () _____

Date of Action

Application received.

Supplemental material received.

Fee paid, amount: \$ _____

Application referred to planning board.

Application approved by planning board.

Zoning permit: ☐ issued ☐ denied

Reasons for denial: _____

Application appealed, ZBA log number: _____

Application referred to building inspector.

Zoning inspections: Remarks:

1. _____
2. _____
3. _____
4. _____
5. _____
6. _____
7. _____
8. _____

Certificate of occupancy: ☐ issued ☐ denied

Reasons for denial: _____

Records filed with town clerk.

ILLUSTRATIVE
USE VARIANCE FINDINGS & DECISION

Applicant: _____

Variance No: _____
Zoning District: _____
Published Notice on: _____
Notice to County Sent on: _____
Hearing Held On: _____

Property Location: _____
Use for which Variance is Requested: _____

Applicable Section of Town Zoning Code: _____
Permitted Uses of Property: _____

TEST: No use variance will be granted without a showing by the applicant that applicable zoning regulations and restrictions have caused unnecessary hardship. The following tests must be met for each and every use allowed by zoning on the property, including uses allowed by special use permit.

1. The Applicant cannot realize a reasonable return, as shown by competent financial evidence. The lack of return must be substantial.: Yes ___ No ___

Proof: _____

**ILLUSTRATIONS OF
FINANCIAL EVIDENCE**

- Bill of sale for the property, present value of property, expenses for maintenance
- Leases, rental agreements
- Tax bills
- Conversion costs (for a permitted use)
- Realtor's statement of inability to rent/sell

2. The alleged hardship relating to the property is unique. (The hardship may not apply to a substantial portion of the zoning district or neighborhood.): Yes ___ No ___

Proofs: _____

**ILLUSTRATIONS OF
UNIQUENESS**

- Topographic or physical features preventing development for a permitted use
- Why would it be possible to construct the applicant's proposal and not any of the permitted uses?
- Board member observations of the property and surrounding area.

3. The requested use variance, if granted, will not alter the essential character of the neighborhood.:
Yes ___ No ___

Proof: _____

**ILLUSTRATIVE
NEIGHBORHOOD
CHARACTER FACTORS**

- Board members' observations of neighborhood.
- Expected effect of proposal on neighborhood, for example, change in parking patterns, noise levels, lighting, traffic.

4. The alleged hardship has been self-created. : Yes ___ No ___

Proof: _____

SELF-CREATED

- What were the permitted uses at the time the property was purchased by the applicant?
- Were substantial sums spent on remodeling for a use not permitted by zoning?
- Was the property received through inheritance, court order, divorce?

DETERMINATION OF ZBA BASED ON THE ABOVE FACTORS:

The ZBA, after reviewing the above four proofs, finds:

- ☐ That the applicant has failed to prove unnecessary hardship through the application of the four tests required by the state statutes.
- ☐ That the applicant has proven unnecessary hardship through the application of the four tests required by the state statutes. In finding such hardship, the ZBA shall grants a variance to allow use of the property in the manner detailed below, which is the minimum variance that should be granted in order to preserve and protect the character of the neighborhood and the health, safety and welfare of the community:

(USE) _____

CONDITIONS: The ZBA finds that the following conditions are necessary in order to minimize adverse impacts upon the neighborhood or community, for the reasons following:

Condition No. 1: _____

Adverse impact to be minimized: _____

Condition No. 2: _____

Adverse impact to be minimized: _____

Condition No. 3: _____

Adverse impact to be minimized: _____

Condition No. 4: _____

Adverse impact to be minimized: _____

Chairman, Zoning Board of Appeals

Date

(OVER)

RECORD OF VOTE

	MEMBER NAME	AYE	NAY
Chair	_____	_____	_____
Member	_____	_____	_____
Member	_____	_____	_____
Member	_____	_____	_____
Member	_____	_____	_____

**ZONING BOARD OF APPEALS
AREA VARIANCE FINDINGS & DECISION**

Applicant: _____

Variance No: _____
Zoning District: _____
Published Notice on: _____
Notice to County Sent on: _____
Hearing Held On: _____

Property Location: _____
Requirement for which Variance is Requested: _____

Applicable Section of Town Zoning Code: _____

FACTORS CONSIDERED:

1. Whether undesirable change would be produced in character of neighborhood or a detriment to nearby properties: Yes ___ No ___

Reasons: _____

2. Whether benefit sought by applicant can be achieved by a feasible alternative to the variance: Yes ___ No ___

Reasons: _____

3. Whether the requested variance is substantial: Yes ___ No ___

Reasons: _____

4. Would the variance have an adverse impact on the physical or environmental conditions in the neighborhood: Yes ___ No ___

Reasons: _____

5. Whether the alleged difficulty was self-created: Yes ___ No ___

Reasons: _____

DETERMINATION OF ZBA BASED ON THE ABOVE FACTORS:

The ZBA, after taking into consideration the above five factors, finds that:

- ☐ the Benefit to the Applicant DOES NOT Outweigh the Detriment to the Neighborhood or Community and therefore the variance request is denied.
- ☐ the Benefit to the Applicant DOES outweigh the Detriment to the Neighborhood or Community.

Reasons: _____

The ZBA further finds that a variance of _____ from Section _____ of the Zoning Code is the minimum variance that should be granted in order to preserve and protect the character of the neighborhood and the health, safety and welfare of the community because:

CONDITIONS: The ZBA finds that the following conditions are necessary in order to minimize adverse impacts upon the neighborhood or community, for the reasons following:

Condition No. 1: _____

Adverse impact to be minimized: _____

Condition No. 2: _____

Adverse impact to be minimized: _____

Chairman, Zoning Board of Appeals

Date

RECORD OF VOTE

	MEMBER NAME	AYE	NAY
Chair	_____	_____	_____
Member	_____	_____	_____
Member	_____	_____	_____
Member	_____	_____	_____
Member	_____	_____	_____

NYS Department of State

Counsel's Office

Opinions of Counsel

ROLE OF FINDINGS IN LOCAL GOVERNMENT DECISIONS

"The absence of ... findings and the inadequacy of the evidence in the record to support respondent's determination requires vacatur of that determination and remittal of the matter to respondent for a hearing, proper findings and a new determination...." *Graham v. Town of Tully Planning Board*, 654 NYS2d 542 at 543 (1997).

Case law reporters are replete with cases which end with similar statements. While the local government body which has made the determination subject to remand has the opportunity to justify its decision, this opportunity is not without cost to both the local government and the community. Local governments must bear the expense of defending board decisions, while applicants or others aggrieved must bear both the expense of the challenge and the cost of lost economic benefit while the project awaits finality. This problem can be avoided. This paper will provide local government boards having discretionary decision-making responsibilities with "rules of thumb" for defensible findings which justify a final determination, whatever it may be.

Local boards, such as planning boards, zoning boards of appeals, historic preservation boards and environmental quality review boards are subject to standard rules of administrative law in that they are not granted unfettered decision-making authority. They may make a decision only when all of the requirements specified in state statute or local law are addressed. The making of administrative findings provides administrative boards with the vehicle for demonstrating their full compliance with all procedural and substantive requirements of law.

What are findings? Simply put, findings are statements which, with analysis, connect the legal requirements governing the granting or denial of relief requested to the facts contained in the record. They are something more than mere reiteration of legal requirements and facts. Proper findings can demonstrate that the "administrative agency determination is shored up by substantial evidence." (See *300 Gramatan Ave. Associates v. State Division of Human Rights*, 45 NY 2d 176 at 181 (1978)).

Conclusory statements are always inadequate to sustain a decision upon review by a court. (See *300 Gramatan Ave. Associates, supra*; *Liebring v. Planning Board of the Town of Newfane*, 144 AD2d 903 (1988); *Bowers v. Aron*, 142 AD2d 32 (1988); *Morrone v. Bennett*, 164 AD2d 887 (1990)). Further, a decision based upon conclusory statements, wholly unsupported by factual information contained in the record, will be struck down as arbitrary and capricious without opportunity for remand. (See *Frangella Mushroom Farms, Inc. v. Zoning Board of Appeals of the Town of Coeymans*, 87 AD2d 962, aff'd 57 NY2d 811 (1982).)

How may findings be supported by the record? First, findings must specifically identify facts found in the record which the board considers relevant in the application of the substantive legal standard relating to their decision. Second, findings must evidence some *analysis* of those facts in relation to the substantive legal standard.

The record is largely composed of facts which come to the board via different avenues: copies of newspaper notices, transcripts and minutes of meetings, public notices, the application and supporting documentation (such as an environmental impact statement), testimony of interested members of the community presented at public hearings, written submissions during the public comment period, expert opinion submitted orally or in written form, and through personal observations and knowledge of board members. A decision which successfully relates the factual evidence to the applicable legal standards in the findings, is given great deference in court:

"It is well settled that a determination of a Zoning Board of Appeals should not be set aside unless illegal, arbitrary or an abuse of discretion....If a decision is rational and is supported by substantial evidence, a reviewing court may not substitute its judgment for that of a zoning

board of appeals even if an opposite conclusion might logically be drawn (Rice, Practice Commentaries, McKinney's Cons Laws of N.Y., Book 63, Village Law, §7-712-c, at 461....).... Those conclusions are supported by the record and provide ample support for the ZBA's determination...." (citations omitted; *Village of Honey Falls v. Town of Mendon Zoning Board of Appeals*, _ AD2d _, 654 NYS2d 534 at 535 (1997)); see also *Fuhst v. Foley*, 45 NY2d 441 (1978)).

When reviewing a decision of an administrative body, courts will limit their review to "ascertaining whether the determination has a rational basis and is supported by substantial evidence." (*Hanson v. Valenty*, 198 AD2d 598 (1993)). Findings provide the courts with the material for conducting this limited review ("[t]his necessarily requires the zoning board to set forth in its determination the evidence it relied upon in reaching its conclusions...." *Hanson*, at 598-599). For example, in *Sasso v. Osgood* (86 NY2d 374 (1995)) the court specifically identified facts in the record (referring to "photographs and other materials in the record") which amply provided the rational basis for the zoning board of appeals' conclusion that each standard for issuing the variance in question had been met.

The board must discern, however, truly factual information from mere "general sentiment," for the latter cannot support a finding:

"We conclude that the denial of the petition for an area variance is arbitrary and capricious and is not supported by substantial evidence.... The record shows that respondent's determination was not the result of a balancing of all of the appropriate factors (*see*, Town Law, §267-b...), but was the result of general community opposition." *D'Angelo v. Zoning Board of the Town of Webster*, 229 AD2d 945 (1996) leave for appeal denied 89 NY 2d 803. (See also *Market Square Properties v. Town of Guilderland*, 66 NY2d 893 (1985), where the court held that, "[w]hile expert opinion regarding traffic patterns may not be disregarded in favor of generalized community objections...here there was other basis in the record for respondent's determination...to which evidence respondent's discretion and common sense judgments might be applied in accordance with the town ordinance....").

First hand observations of neighbors incorporated into the record are distinguishable from "conclusory or general observations" and may be considered by a board in its discretion. (See *Michelson v. Warshavsky*, _ AD2d _, 653 NYS2d 622 (1997)). Similarly, personal observations and knowledge of board members may provide the factual basis for a decision, so long as those observations and knowledge are entered into the record. (See *Filangeri v. Pulichene*, _ AD2d _, 645 NYS 2d 151 (1996); *Tunis-Huntington Dodge, Inc. V. Horn*, 29 AD2d 990 (1968)). It is axiomatic that information within the knowledge of the administrative decision maker but **outside** the record of the matter before it cannot be utilized to support its decision. (See *Simpson v. Wolansky*, 38 NY2d 391 (1975); *Mulligan's Night Club & Cafe, Inc. v. Buffalo Common Council*, 184 AD2d 1016 (1992); *Langhorne v. Jackson*, 206 AD 2d 666 (1994).

Courts will defer to the determinations of an administrative body relating to credibility of witnesses, the weight of evidence and relevance of evidence to the applicable legal standards:

"The agency's assessment of the credibility of witnesses, inferences to be drawn from the evidence and findings of fact are conclusive if supported by substantial evidence...." *Jackson's Marina, Inc. v. Jorling*, 193 AD2d 863 at 866 (1993). (See, also, *Hirsch v. New York State Department of Motor Vehicles*, 182 AD2d 761 (1992), citing *PASNY v. Williams*, 101 AD2d 659, leave for appeal denied 63 NY 2d 605).

If a board has failed to make findings, courts generally will remit the matter back to the board:

"Here, respondent [planning board] failed to make findings supporting its determination that development of lots 1 through 10 was acceptable but that, absent a second access, development of lots 11 through 25 was unacceptable. The absence of such findings and the inadequacy of the evidence in the record to support respondent's determination requires vacatur of that determination and remittal of the matter to respondent for a hearing, proper

findings and a new determination...."(citations omitted; *Graham v. Town of Tully Planning Board*, _ AD2d _, 654 NYS2d 542 at 543 (1997)).

Occasionally, however, a failure to making findings and lack of sufficiency of the record will result in annulment of the board's decision and remittal with direction that the permit be issued. (*Van Wormer v. Planning Board of the Town of Richland*, 158 AD2d 995 (1990)). Where remand for the purpose of making factual findings will serve no purpose "because the record clearly indicates that the Board's action in revoking petitioner's excavation permit is contrary to law [relating to reconforming uses]" the court may step in to decide the matter even absent the existence of findings by the local zoning board of appeals. (See *Syracuse Aggregate v. Weise*, 51 NY 2d 278 (1980)).

Findings memorialize the process the administrative board undertakes when it makes a decision. It must first collect the evidence found in the record, then appraise the evidence by assigning it appropriate weight and credibility. Only then may the board correlate the evidence with the applicable legal standard to result in findings which, cumulatively, yield the board's final decision. The board which clearly memorializes this process by including detailed and carefully written findings in its decisions has given itself the best insurance against successful challenge.

This memorandum provides general information and guidance only. The authors encourage local board members to seek legal counsel for any specific question or matter under review.

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